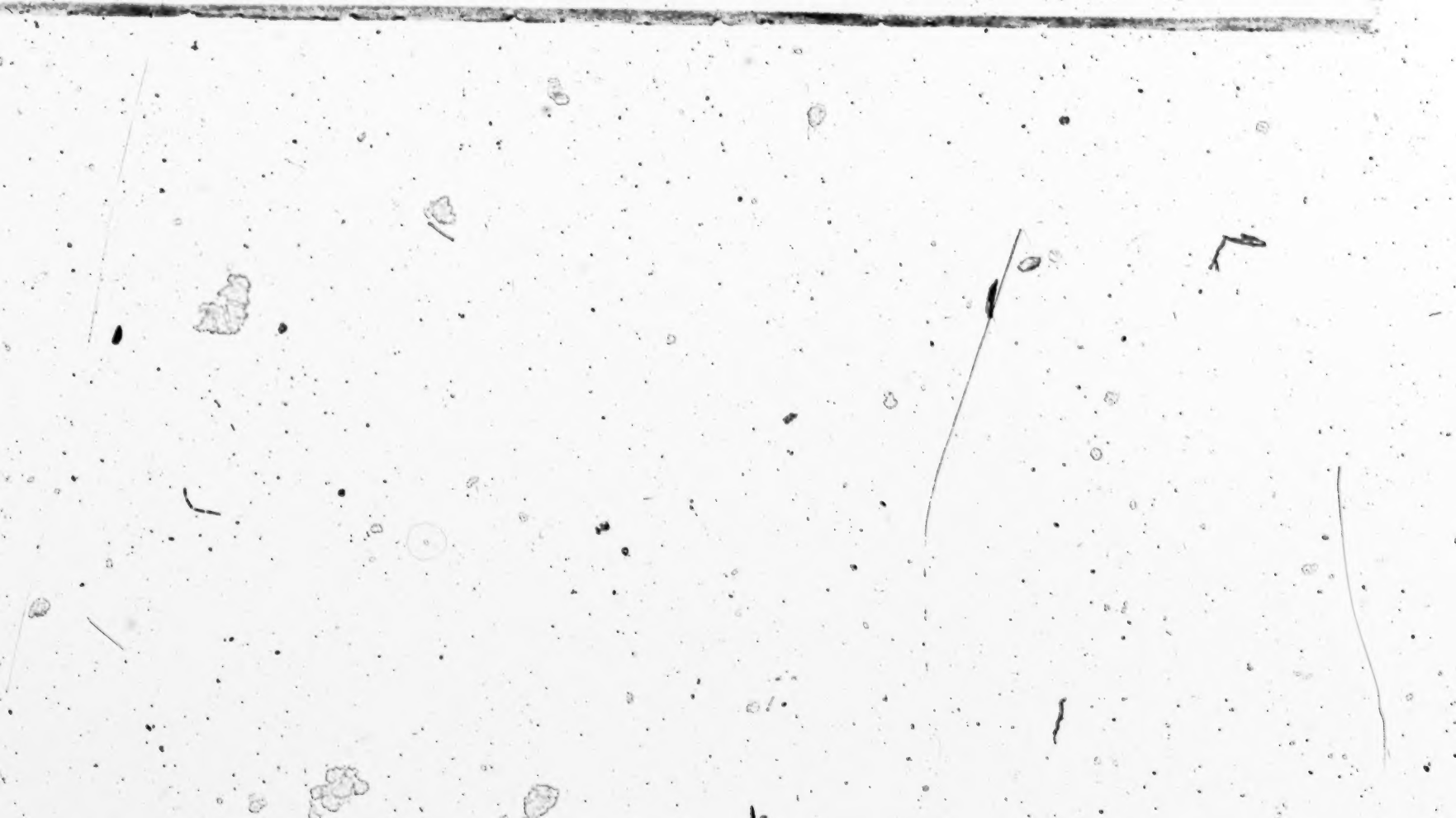

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No. 569

In the Supreme Court of the United States

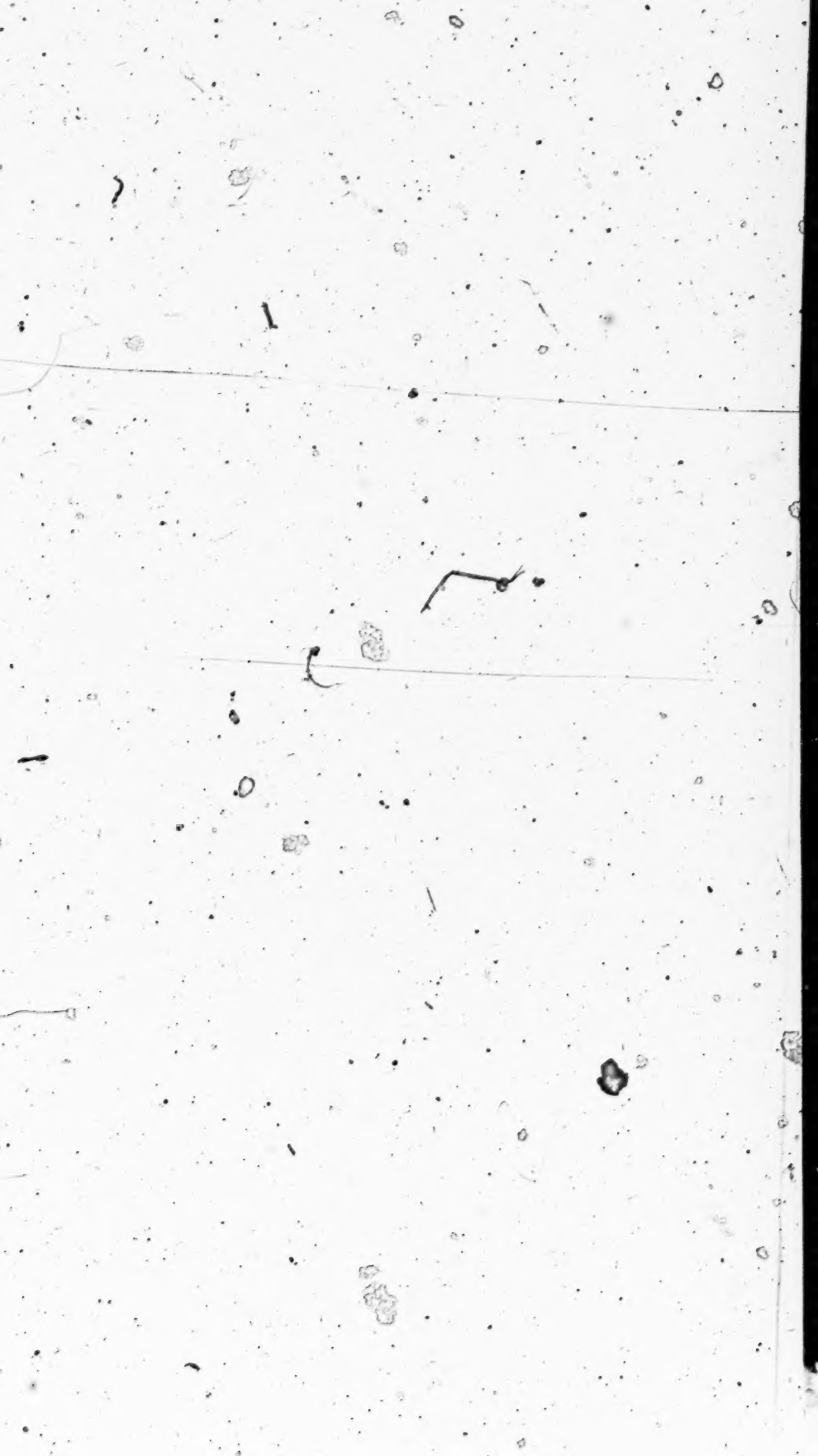
OCTOBER TERM, 1939

UNITED STATES OF AMERICA, PETITIONER

v.

UNITED STATES FIDELITY AND GUARANTY COMPANY, A CORPORATION, J. M. BERNARDIN, TRUSTEE OF THE CENTRAL COAL AND COKE COMPANY, AND THE CENTRAL COAL AND COKE CORPORATION, A CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT



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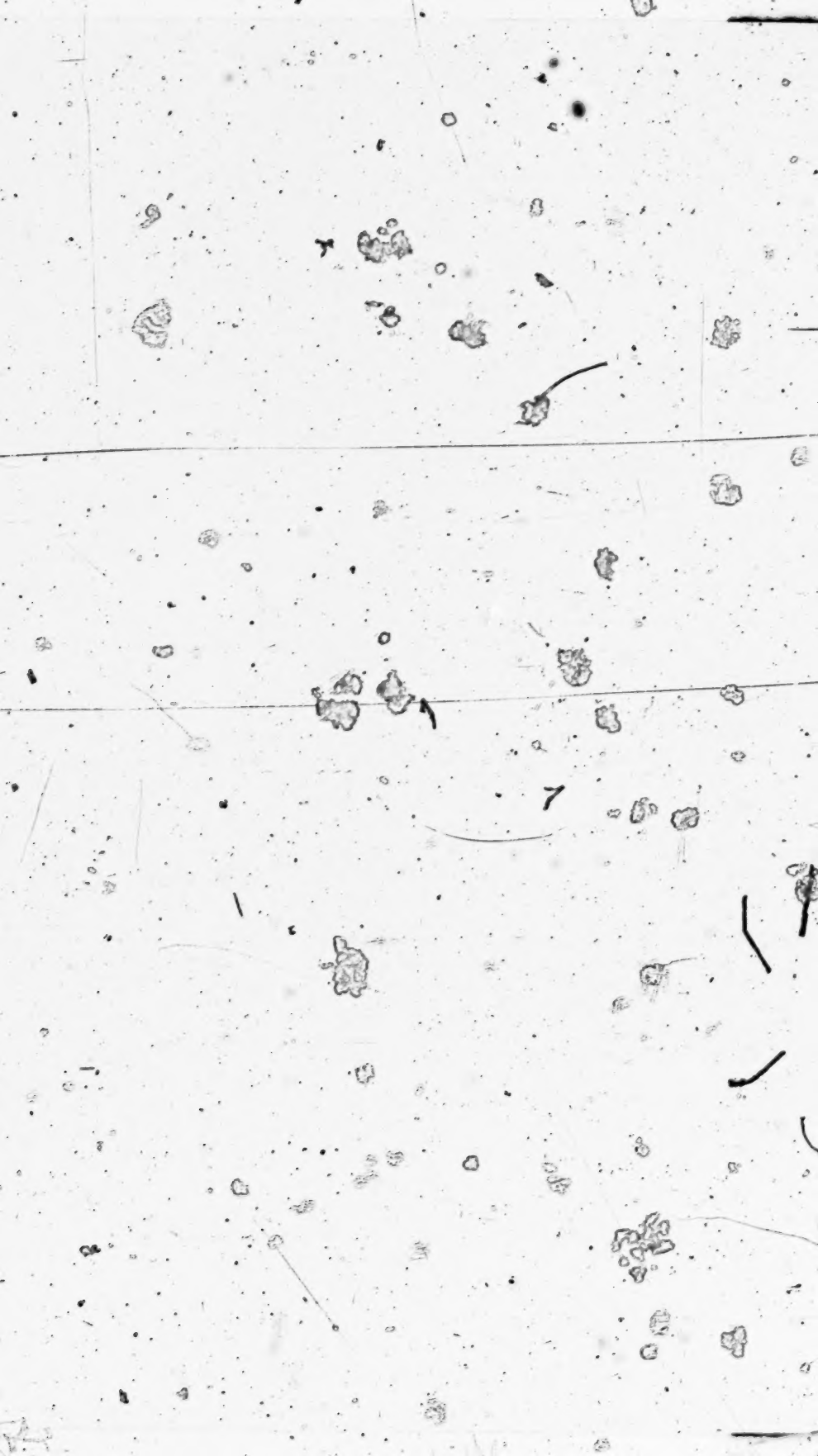

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit, entered in the above cause on September 6, 1939, modifying and affirming the judgment of the United States District Court for the Eastern District of Oklahoma.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 143–149) is reported in 106 F. (2d) 804. The opinion of the District Court (R. 125–133) is reported in 24 F. Supp. 961.

JURISDICTION

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on September 6, 1939 (R. 150). A timely (R. 151) petition for rehearing was denied on November 8, 1939 (R. 153). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the balance found to be due the counter-claimant in a suit brought by the United States on behalf of the Choctaw and Chickasaw Nations in the district court in Western Missouri is binding on a district court in Oklahoma possessing special jurisdiction over claims against the tribes. This question turns on whether the Missouri court had jurisdiction to enter an affirmative judgment against the tribes or to make a binding determination of the balance due from them.[1]

STATEMENT

The Choctaw and Chickasaw Nations, pursuant to authority conferred by the Act of June 28, 1898, c. 517, 30 Stat. 495, executed two separate coal and asphalt leases covering certain tribal lands (R. 119, 45, 50).

[1] A further question, which will be urged if the petition be granted, is whether Section 18 of the Act of April 26, 1906, c. 1876, 34 Stat. 137, which confers on the federal courts in Oklahoma special jurisdiction to adjudicate "any claim" interposed by the "party defendants" to a suit brought by the Secretary of the Interior on behalf of the Five Civilized Tribes, confers jurisdiction on those courts to adjudicate the claims of an "intervener."

The United States Fidelity and Guaranty Company became surety on the bond given by the lessee for the faithful performance of its obligations contained in the leases (R. 119, 54–56). The Central Coal and Coke Company, a corporation organized under the laws of Missouri, acquired the leases by assignment with the consent of the surety (R. 119, 33–34). The leases provided for payment of advance royalties and deficit royalties (R. 47, 52).

The Central Coal and Coke Company was placed in equity receivership in the United States District Court for the Western District of Missouri (R. 120). Acting on behalf of the Choctaw and Chickasaw Nations, the United States in 1931 filed in that court a claim against the receiver of the said company for advance and deficit royalties totaling $4,800 (R. 120, 34–35). In 1935 the trustee, appointed pursuant to Section 77B of the Bankruptcy Act, filed an answer and a counterclaim (R. 26–28, 36–42). The special master to whom the matter was referred allowed the Government's claim to the extent of $2,000, and the company's counterclaim to the extent of $11,060.90 (R. 121, 56–66). The court denied exceptions to the report and entered judgment that the United States on behalf of the Choctaw and Chickasaw Nations take nothing, and that the claim of the Central Coal and Coke Company be fixed as against such Nations in the sum of $9,060.90, to be secured and collected in the manner provided by law (R. 121, 66–67). No appeal was taken from that judgment (R. 122).

While the claim and counterclaim were pending in Western Missouri, the United States in its own behalf

and for the Choctaw and Chickasaw Nations filed suit in the federal district court for the Eastern District of Oklahoma against the United States Fidelity and Guaranty Company as surety on the coal company's bond to recover judgment for these identical royalties (R. 11–16). The trustee of the Central Coal and Coke Corporation and its predecessor, the Central Coal and Coke Company, by leave of court (R. 29) intervened and pleaded on its merits the same counterclaim which had been litigated in Western Missouri, and also pleaded the judgment rendered in that court (R. 24–26). The surety company by amended answer followed the allegations contained in the petition in intervention (R. 16–18). By way of answer and reply the United States pleaded that the judgment rendered in Western Missouri was void for the reason that the court was without jurisdiction to render judgment against the United States upon the counterclaim (R. 18–22).

The trial court determined that the court in Western Missouri had jurisdiction of the parties and of the subject matter of the claim and counterclaim; that the judgment rendered therein was valid and not subject to collateral attack; and that the interveners were entitled to an affirmative judgment against the Indian tribes in the amount determined by the court in Missouri, namely, $9,060.90, with interest and costs (R. 119–134).

The judgment of the District Court, except as to interest and costs, was affirmed by the Circuit Court of Appeals. That court held, *inter alia:* (1) that "the Choctaw and Chickasaw Nations are sovereigns immune

to civil suit except when expressly authorized"; (2) that it was unnecessary to determine whether the court in Missouri had jurisdiction to render an affirmative judgment against the Indian Nations because no such judgment was rendered; "the judgment of the court in Missouri merely adjudicated the respective amounts due on the claim and the counterclaim * * * and fixed the balance due on the counterclaim as against the Indian Nations at $9,060.90, to be secured and collected in the manner provided by law"; and (3) that this determination of the balance due the Central Coal and Coke Corporation was binding on the court in Oklahoma, so that the interveners in the Oklahoma proceeding were entitled to an affirmative judgment against the Indian tribes for $9,060.90.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the balance fixed by the district court in Western Missouri was binding on the district court in Oklahoma.

2. In holding that the court in Oklahoma had jurisdiction to render an affirmative judgment in favor of an "intervener."

REASONS FOR GRANTING THE WRIT

The district court for the Western District of Missouri had no jurisdiction to render an affirmative judgment against the United States [2] or against the Choctaw

[2] See petition for writ of certiorari in *United States* v. *Shaw*, filed December 5, 1939, p. 6.

and Chickasaw Nations.[3] The court below found no need to determine whether the district court for Western Missouri had jurisdiction to render an affirmative judgment.[4] Nevertheless, it held that the Missouri court "had jurisdiction to judicially determine" the amount due on the counterclaim, and that its judgment was therefore binding on the district court in Oklahoma (R. 148).

The district court in Oklahoma had jurisdiction to entertain a counterclaim in a suit brought on behalf of the tribes, and to enter an affirmative judgment on the counterclaim. Act of April 26, 1906, c. 1876, 34 State. 137, Sec. 18. But it was not foreclosed by an

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[3] These tribes are sovereigns immune to suit except when expressly authorized. *Turner* v. *United States*, 248 U. S. 354, 358; *Thebo* v. *Choctaw Tribe of Indians*, 66 Fed. 372 (C. C. A. 8); *Adams* v. *Murphy*, 165 Fed. 304 (C. C. A. 8). Like other sovereigns they do not subject themselves to affirmative liability on a counterclaim by the mere fact of coming into court. *Kingdom of Roumania* v. *Guaranty Trust Co.*, 250 Fed. 341, 344 (C. C. A. 2), certiorari denied, 246 U. S. 663; *French Republic* v. *Inland Nav. Co.*, 263 Fed. 410, 413 (E. D. Mo.); *In re Paterson-MacDonald Shipbuilding Co.*, 293 Fed. 192, 193 (C. C. A. 9), affirming 284 Fed. 281, certiorari denied, *sub nom. McLean* v. *Australia*, 264 U. S. 582; *Republic of France* v. *Pittsburgh S. E. Co.*, 112 Misc. 688 (1920); note, 106 A. L. R. 1247.

[4] The court in Missouri "merely adjudicated the respective amounts due on the claim and counterclaim, applied sufficient of that due on the counterclaim to offset in full the claim, and fixed the balance due on the counterclaim as against the Indian Nations at $9,060.90, to be secured and collected in the manner provided by law" (R. 148).

affirmative judgment entered by the district court in Missouri, which had no such jurisdiction.[5]

1. The decision of the court below is in direct conflict with *United States v. Eckford*, 6 Wall. 484. That case followed upon an action brought by the United States in the federal circuit court in New York to recover from a surety for the defalcation of his principal. The defendants interposed certain set-offs. The jury found that $20,545.59 was due from the United States to the defendants. On this verdict there was entered a judgment "that the United States of America take nothing by their said bill, and that the defendants do go thereof without day; and that the said surviving executors are entitled to be paid the said balance so certified". The The claim was not paid and the executors brought suit against the United States in the Court of Claims. The Court of Claims held (1 C. Cls. 220) that it was bound by the jury's finding and the judgment of the circuit court, refused to reexamine the merits of the claim, and entered a judgment against the United States for $20,545.59. This Court reversed. "When the United States is plaintiff," the Court held, "and the defendant has pleaded a set-off, which the acts of Congress have authorized him to do, no judgment can be rendered against the government, although it may be judicially ascertained that, on striking a balance of

[5] The jurisdiction of the district court in Missouri was not contested in that court on the present ground, so there is no question of *res judicata* involved in the jurisdictional issue. (R. 22.) See *Stoll* v. *Gottlieb*, 305 U. S. 165.

just demands, the government is indebted to the defendant in an ascertained amount"[6] (p. 491). Therefore, since the circuit court was without jurisdiction to render an affirmative judgment against the United States, its determination of the amount due to the defendant was not conclusive on the Court of Claims.[7] The judgment entered by the district court in Missouri could be no more conclusive on the district court in Oklahoma.

2. The decision of the court below is also in direct conflict with *Adams* v. *United States*, 3 C. Cls. 312. There the United States brought suit in the federal district court in California seeking an accounting as to certain liens for storage of a steam sawmill. The court found that $10,360 was due the defendants and payment was decreed. No appeal was taken by the Government. The assignee of the defendants in the California litigation filed suit in the Court of Claims on the decree. He contended that the decree was *res judicata*, and that no other evidence of his claim need be presented. The Court of Claims dismissed his petition, relying upon the *Eckford* case. It held (pp. 332–333) that set-offs

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[6] Cf. *Reeside* v. *Walker*, 11 How. 272, 290; see also H. Rept. No. 163, 28th Cong., 1st sess. (Ser. No. 445), pp. 2–5, where the House Judiciary Committee declared that a finding by the federal court in Pennsylvania of the amount due Mrs. Reeside on her cross-claim against the Government was not "binding", because Congress had not conferred on the federal courts jurisdiction to render affirmative judgments on counterclaims.

[7] The case was remanded for further proceedings. Pursuant to that mandate, the $20,545.59 "judgment" of the circuit court was reexamined and subsequently reduced to $4,827.51. *Tillou et al., Executors* v. *United States*, 6 C. Cls. 452.

could only be admitted as claims for credit and not as demands for judgment, and that any affirmative judgment for the excess was beyond the jurisdiction of the court, and to that extent void.

3. A decision by this Court in this case would further clarify the legal problems which arise when cross-claims are filed against the United States in the district courts, a question of much importance both to private litigants and to the Government. A decision in the instant case would complement that sought in *United States* v. *Shaw*, petition for writ of certiorari filed December 5, 1939. Cf. *Danforth* v. *United States*, decided December 4, 1939, No. 309, this Term.

CONCLUSION

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ROBERT H. JACKSON,
Solicitor General.

DECEMBER 1939.

U. S. GOVERNMENT PRINTING OFFICE: 1939